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CONTRIBUTORY NEGLIGENCE.

THE opinions in the earliest cases upon contributory negligence, Butterfield *v.* Forrester,[1] and its little known predecessors, Conden *v.* Fentham [2] and Clay *v.* Wood,[3] offer no indication that the court is aware that any new doctrine is being announced. That a plaintiff who by his own misconduct in conjunction with that of the defendant has brought harm upon himself, cannot recover damages, is stated as a well-settled rule. There is, therefore, no discussion of general principles, no logical argument applying such principles to the particular facts and showing that they necessitate the result reached by the court. All attempts to ascertain upon what legal principle the defense of contributory negligence is based, are therefore efforts *ex post facto*, to explain and account for a result already reached apparently unconsciously. The ready acceptance by the profession of the decision as conclusive, the entire absence of any attempt by counsel to attack it, seems clearly to negative the idea that it was an innovation, an anomalous rule applicable only to its own circumstances, — justifiable only by its convenience and utility. Had it not been the exhibition under the peculiar circumstances of some well-settled, universally recognized and accepted general legal conception, there can be no doubt that its introduction would have been sharply contested, instead of hardly causing a ripple in the placid surface of professional thought.

Setting aside, therefore, the suggestion that the defense of contributory negligence is a pure anomaly justified by its utility under the peculiar facts under which it arises, it is necessary to examine

[1] 11 East 60 (1809). [2] 2 Esp. 685 (1798). [3] 5 Esp. 44 (1803).

carefully the theories upon which it has been from time to time attempted to explain the defense, to see whether any of them in reality offers a satisfactory explanation, and if not, whether there is in fact any fundamental principle of legal thought to which it can be ascribed.

Three theories are commonly advanced as to the basis of the defense of contributory negligence. It is maintained that it depends on the application to the particular facts of the rule governing (1) proximity of legal causation; (2) indemnity or contribution between joint tortfeasors; or (3) voluntary assumption of risk as expressed in the maxim *volenti non fit injuria*.

Taking first the theory that the plaintiff's wrongful assisting act breaks the chain of proximate causation between his own harm and the defendant's misconduct,[1] it is necessary to ascertain if possible what proximity of legal causation is, and what part it plays in legal liability.

It would be obviously opposed to any possible conception of justice that any one should be required to answer for a harm unless he had actually caused it. It is therefore always a vital prerequisite to recovery to establish that the plaintiff's harm was caused by the defendant's alleged misconduct. As to what is to be regarded as the cause of any given result admits of much difference of opinion. It is possible to regard as a cause any *causa sine qua non*, without which the result would not have happened, including every antecedent to the most remote, or, again, only to consider that a cause which operates directly to produce the result. Or the true conception may well be taken to lie between these two extremes.

Legal proximity of causation may be defined as that conception of cause and effect which has been adopted by the courts as the test by which to ascertain whether a particular harm is to be ascribed to a particular act or omission as its consequence as a prerequisite to the imposition of legal responsibility therefor. This conception has from time to time varied. The primitive concep-

[1] This is the explanation usually given by text-writers. Webb's Pollock, Torts, 573; Wharton, Negligence, 2 ed., § 132–133; Whittaker's Smith, Negligence, 373; Thompson, Negligence, 1156; Beach, Contributory Negligence, 10–11 *et passim;* Bishop, Non-Contract Law, § 463, n. 2. And see Bowen, L. J., in Thomas *v.* Quartermaine, 18 Q. B. D. 685, 697. "It [contributory negligence] rests on the view that though the defendant had in fact been negligent, yet the plaintiff by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred — and that the defendant's negligence accordingly is not the true proximate cause of the injury."

tion of a sufficient legal cause was a *causa sine qua non*.[1] When this idea was abandoned, the rebound carried judicial opinion to the opposite extreme, that no one should be answerable beyond (1) the direct result of his misconduct, his trespass, his semi-criminal *delict*, or (2) those indirect results actually intended.

As society became more highly organized, civilization more complex, it was evident that to prohibit violence and acts intended to be harmful was not enough; some further protection was required. Similarly, the citizen injured found little real compensation in the good intentions of him who had without violence and unintentionally brought harm upon him. It was necessary to add something to this test of wrongfulness, to this narrow field of liability, so as to enforce a decent social decorum, and to give compensation more really proportionate to the harm sustained by one whose rights were without violence, or unintentionally invaded without fault of his own. It thus came to be said that "every man must be presumed to intend the natural and probable consequences of his act." Here the judges appeared to be merely laying down a rule of purely procedural law, dealing with the effect which might be given to evidence, — a matter manifestly within their powers, and part of their function as presiding officers of a court of justice. Yet in so doing, as in so many other similar cases, without the appearance of judicial legislation, without incurring the stigma attached to law reformers, they substantially changed the whole conception of legally wrongful conduct, and immensely enlarged the limits of legal responsibility for admitted injuries. The presumption, by precluding inquiry into what was actually intended when the result was natural and probable, established between the two things a forced equivalence in legal effect. The whole conception of legal causation was enlarged, and an actor became as fully liable for the natural and probable consequences of his act, though unintended, as before he had been when the result had been foreseen and designed.[2]

In defining the test by which this new social duty is to be ascertained, this enlarged measure of responsibility applied, the tendency of modern judicial opinion is overwhelmingly toward a full

[1] 2 Pollock and Maitland, History of the Common Law, 469–471.

[2] But while a new conception was added, the old remained and still remains. No question of natural or probable causation arises where the actor actually intended the specific harm suffered, — for that he is now answerable, as he always was punishable, though to others it would appear both an unlikely and abnormal result.

recognition of the popular conception of what is natural or probable as the standard to be adopted. The question, usually one for the jury, is to be solved by them in accordance with what men like themselves would actually foresee as likely to result from the conduct in question, or, after the event, is seen to be in accordance with common experience, such as theirs, of the known and actual course of nature. It is the actual foresight of the average man, in view of the circumstances which he knows or should know, of the real probability of injury to others, picturing the future course of events, the real conditions which will probably be created, the effect of the known habits of human beings and of the ordinary operation of usual natural forces under such conditions, as affecting the injurious tendency of his acts. This is what determines the wrongfulness of the act so far as it depends solely on proximity of causation. So, if the wrongfulness of the act be admitted, it is the actual course of nature depending on the orderly operation of known natural forces, including again the customary habits of mankind under given circumstances, by which proximity of the harm to such wrong is ascertained.

The proximity between the act done and the harm sustained is, however, only one step to the determination of the final question of legal liability.[1] This depends also on many other principles of limitation of legal liability, entirely distinct, in no way depending on causal connection, having their bases in some cases in the historical development of the law, in others in principles of policy, in conservative instinct at times retarding the growth of advanced legal conceptions, or in deep-rooted fundamental principles of justice as conceived and developed in the common law of England.

There was prevalent in the early part of the nineteenth century, just at the time when the earliest cases of contributory negligence were decided, a principle of limitation of liability, purely legal, the creature of judicial rather than popular conception of justice, stopping recovery short of either the probable or natural result of the act complained of. This rule or principle, now practically obsolete,[2]

[1] Mr. Beven in his admirable treatise on Negligence very properly treats proximate causation as only one of the factors in ascertaining legal responsibility, a factor, it is true, unique in that it is for the jury, a question to be determined by laymen according to their experience of actual affairs.

[2] The decided though perhaps not unanimous tendency of modern authority is to make the liability of the original actor depend not upon the negligence or even intentional wrongfulness of the subsequent act of a third party, which is the final decisive

was thus stated by Lord Ellenborough[1] in the leading case of Vicars *v.* Wilcocks.[2] "Special damage" — the case was one of slander — "must be the legal and natural consequence of the words spoken. Here it was an illegal consequence, a mere wrongful act of the master" (who discharged the plaintiff in consequence of what the defendant had said). "His Lordship asked whether any case could be mentioned of an action of this sort, sustained by proof only of an injury sustained by the tortious act of a third person."[3]

It is highly doubtful if this limitation has any real relation to proximity of causation. To consider the last acting efficient cause, the final decisive impulse, as the sole responsible cause would merely be to change the judicial conception of causal connection sufficient to create *primâ facie* liability. Since, however, the

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cause of the plaintiff's harm, and so upon the legal culpability of such act, but rather upon this, — whether or not, in view of the surrounding circumstances, and the conditions which the defendant's conduct may be expected to create, the third party's subsequent action was normal, and so, expectable. Burrows *v.* March Gas Co., L. R. 7 Exch. 96; Clark *v.* Chambers, 3 Q. B. D. 327; Englehart *v.* Farrant, [1897] 1 Q. B. 240; McDowell *v.* R. R., [1903] 2 K. B. 331; Lane *v.* Atlantic Iron Works, 111 Mass. 136. See also Snyder *v.* R. R., 85 Pac. 686 (Col.), where the rule in Lane *v.* Iron Works is approved, but the intervening act is held to be one which under the circumstances was abnormal and unforeseeable. It is true that if the intervening act be intentional the defendant is usually not liable. There is normally no reason to anticipate wilful wrongdoing of others, but this only bears on the question as to whether the act is expectable or not. In exceptional situations even wilfully wrongful acts of others are normal and expectable. Harrison *v.* Berkley, 1 Strob. (S. C.) 525; Kennedy *v.* R. R., 32 Pa. Super. Ct. 623 (a passenger injured by riotous students assembled to greet a returning football team). Compare Snyder *v.* R. R., *supra*. And see Cobb *v.* R. R., [1895] A. C. 419, and Pounder *v.* R. R., [1892] 1 Q. B. 385. The liability of a negligent defendant is carried to a great length in the recent case of De LaBere *v.* Pearson, [1907] 1 K. B. 483, where a newspaper proprietor is held liable to a subscriber whose money had been stolen by a broker, an undischarged bankrupt, to whom it had been entrusted by the subscriber for investment on the recommendation of the financial editor, who had taken no pains to ascertain the true character of the broker, of which, however, he did not actually know. While this is the tendency of modern cases, the rule of Vicars *v.* Wilcocks, 8 East 1, still occasionally crops up as a refuge to a court wishing in a hard case to relieve some unfortunate rather than morally wrongful delinquent from the extreme burden of full liability for all the actually proximate results.

[1] The same judge who decided Clay *v.* Wood (1803) and Butterfield *v.* Forrester (1809).

[2] 8 East 1 (1806).

[3] Lewis for plaintiff states the modern view. "It was not less a consequence of [the slander] because the act so induced was wrongful on the part of the master." He said he could find no case where such a construction was laid down. It is to be noted that Lord Ellenborough in his opinion cites none, and that the practice at Nisi Prius was understood to be otherwise.

last actor, the author of the final decisive act, is regarded as the sole center of legal responsibility only when such act is legally a wrong, it is evident that it is not with the causal relation alone that one is dealing, but with the causal relation plus some restrictive principle or policy of remedial law, which, where the injured party has recourse against the last wrongdoer, considers him sufficiently protected, and relieves the antecedent wrongdoer of an onerous and superfluous burden.

Mr. Beven is therefore probably right in treating this as a separate limitation of legal liability quite distinct from proximity of causation. However, courts and text-writers less discerning than Mr. Beven, seeing in the rule of Vicars *v.* Wilcocks an apparent kinship to proximity of causation in that it dealt with the liability for the effect of acts as depending on the legal character of an essential link in the chain of actual causation, treated it not as a separate principle of law stopping liability at a point short of the limits of actual proximity, but as an auxiliary rule enforcing, where there are successive acts of misconduct, an arbitrary legal conception of proximity, making the last act the sole legal cause.

The disability of the plaintiff, whose negligence was the *final* decisive cause of his harm, to recover, is but an obvious application of the rule in Vicars *v.* Wilcocks to the facts of the case. Similarly the so-called Doctrine of the Last Clear Chance, whereby a defendant whose negligent act was the final decisive cause of the accident was liable to the plaintiff even though the latter had at an earlier stage been guilty of some default placing him within the reach of the effects of the defendant's act, is also a necessary result of that rule applied to such facts,[1] and not, as it appears today, an anomalous exception[2] based on the hardship which would result from the rigorous and logical application of the general principles of contributory negligence. In Davies *v.* Mann,[3] cited as the earliest case of this sort, the only novelty is the exten-

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[1] See the charge of Erskine, J., and the language of Parke, B., commenting thereon in Davies *v.* Mann, 10 M. & W. 546 (1842). Curiously enough, the present attitude of judicial opinion, which has practically repudiated the rule of Vicars *v.* Wilcocks, is very largely due to the opinion of this same judge, then Lord Wesleydale, nineteen years later in Lynch *v.* Knight, 9 H. L. Cas. 577.

[2] See Putnam, J., in Dredge No. 1, 134 Fed. 161, arguing that since in admiralty cases the damages were divided, the last clear chance doctrine (a mere merciful anomaly), not being needed, did not apply. But see Cayzer *v.* Carron Co., 9 App. Cas. 873.

[3] 10 M. & W. 546.

sion to successive acts of mere omissive negligence of principles applied in Clay *v.* Wood[1] to successive conscious and intended misconducts.[2]

But where the misconducts were not successive but simultaneous, the rule of Vicars *v.* Wilcocks, the principle limiting legal liability to the last wrongdoer, had no application. There must be, to use Mr. Brown's phrase, a last legally responsible wrongful agent before there is a sole center of liability. If the acts were simultaneous, the influence of the early semi-criminal aspect of tort which punished a trespasser for his wrong, was still strong enough to hold each wrongdoer, as the criminal law does, responsible *in solido*. The injured party might, at his election, collect from either of the independent wrongdoers whose acts together, judged by the popular view of proximity, had caused his harm, the full loss sustained, and it was no defense, not even a mitigation of damages, that others beside himself had in part caused the loss; not even that but for such other's conduct his act might or would probably have been harmless. Yet when the case of a plaintiff guilty of negligence contemporaneous with that of the defendant came up for decision in Vennall *v.* Garner,[3] and in Pluckwell *v.* Wilson,[4] it was held that the plaintiff could not recover for harm caused in part by each, Bayley, B., saying in the first case, "If the mischief be the combined negligence of both, they must remain in *statu quo*, and neither can recover against the other"; and Alderson, B., a most accurate judge, charged the jury in the second, that, "If the plaintiff's negligence in any way concurred in producing the injury, the defendant is entitled to the verdict."

In fact, taking legal cause to include, as in effect it did at that time, the modification that an antecedent misconduct affording an opportunity for a later default to work mischief was not the legal cause thereof, the rule might be stated thus: If the plaintiff's act was any part of the legal cause of his harm, he can have no legal redress against a defendant whose misconduct was also part of the legal cause of the harm. No existing conception of legal even as

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[1] 5 Esp. 444.

[2] Where the two negligent acts are successive, Mr. Beven's statement that "Contributory negligence is but a case of negligence not dependent on any different rule of law, but presupposing the limitation of the general question of negligence to an inquiry as to which of two persons its final impulsion should be imputed," is a substantially accurate statement of the law as it existed when the earlier cases were decided. 1 Beven, Principles of the Law of Negligence, 2 ed., 176.

[3] 3 Tyrw. 85.

[4] 5 C. & P. 375.

distinguished from actual causation was adequate for this situation. Evidently some further fundamental restrictive principle bars recovery.

Does this then existing conception admit of a modification which without utterly destroying the fundamental ideas underlying it will account for the result? Does the added element of the plaintiff's authorship of one of the concurrent negligent causes render his harm remote in any sense cognate to that recognized by the existing conception of legal causation? So far legal causation has dealt with the relation of act to result as cause to effect. The modification in Vicars *v.* Wilcocks added to a consideration of the actual sequence of events a scrutiny of the legality or illegality of the various steps therein, but even so modified [1] the rule deals with the various links in the chain of causation as between a harm as a physical consequence and the act which is alleged to cause it as an act, and is applied impartially to ascertain in all cases whether a sufficient causal relation exists to render the actor liable for the harm suffered. The change now proposed is not a modification, as this is, of the primary conception of proximate causation; it is, on the contrary, an entirely new and antagonistic idea. Admittedly it does not afford a test whereby in all cases the question of the defendant's liability, in so far as it depends on the proximity of causation between his act and the plaintiff's harm, is to be determined. On the contrary, it applies only in particular cases and between parties litigant to destroy a chain of causation sufficient to render the defendants *primâ facie* liable, and it regards an act, already seen to be a sufficient link in the chain of legal causation, as a break therein, not because any new fact has altered its actual position in the sequence of events, not even because of some newly discovered legal characteristic, but simply because the person legally responsible therefor is seeking compensation for the harm it has aided in bringing on him. This is not a modification of the original conception of legal proximity; it is an entirely new and antagonistic principle. The one deals with the relation of fact to fact as *facts*, the other concerns itself with the merits and demerits of the authors thereof as parties litigant. Since the facts and the connection between them remain the same by whomsoever they are done, and since these facts are already seen to be legally cause and effect, it is impossible to say they are no

[1] Granting that the modification has any real connection with causation, which is more than doubtful, see *ante*, p. 238.

longer so connected because the same party who sues is legally the author of one of those assisting acts already seen to be sufficient links in the chain of causation, — at most one can say merely that they are deemed or presumed to break the chain of causation. But, as in all cases when a presumption demands that two things shall be considered the same, which reason tells us may well be quite different, we are driven back to the final inquiry — what rule of remedial law — what principle of public policy or what fundamental conception of justice common to all jurisprudence or peculiar to our common law requires the arbitrary legal equivalence between two things not in their nature necessarily similar, or even, as in this case, fundamentally opposite to one another? [1]

No conception of legal cause which has ever been applied to ascertain legal liability in general will account for the doctrine of contributory negligence in all of its phases. While the rule in Vicars *v.* Wilcocks might account for it where the negligences are successive, it has no application where they are concurrent. The modern view that legal causation depends on what is actually probable and natural, and that the mere wrongfulness of an existing act is *per se* immaterial, leaves even the case of successive negligences without support in the now existing principles of legal proximity of cause and effect. To ascribe the defense of contributory negligence to a principle which never fully accounted for it, and which now fails to account for it at all, only serves to cloud the subject of legal causation, already replete with difficulties, by introducing a new and alien conception, without aiding in ascertaining the final

[1] Of course it is possible to account for the defense of contributory negligence, or rather to conceal the fact that there is anything to account for, by using the term legal causation in a sense which it is capable of bearing without any palpable distortion of language, as indicating those results for which the originator of the alleged cause is responsible legally, — the argument in favor of such a reasoning has some apparent force. How can it be said that any result is the legal consequence of an act which the law deems so far removed, whether by reason of its lack of actual proximity or because of any principle limiting legal liability for actually proximate results, that it refuses to recognize it as a basis of legal claim or redress against the author of the alleged cause? Obviously, however, this is merely to state in terms of apparent causation the limits of legal liability. It does not in any way explain why liability is so limited. It is possible in this way to state the whole of the substantive law in terms of causation, as Professor Greenleaf in his second volume of his work on Evidence stated it in terms of evidence. One could as well account for the inability of an alien enemy to recover for a harm specifically intended, and directly caused, by saying that the act was not the legal cause of his injury, or say that a judge's abuse of his judicial power in maliciously committing an attorney did not legally cause his resulting imprisonment.

basis upon which rests the inability of a plaintiff, whose harm has been caused in part by his own misconduct, to recover from his fellow delinquent.

Clearly the defense of contributory negligence cannot be ascribed to the rule which denies contribution or indemnity between joint tortfeasors. Contribution and indemnity are concerned with joint wrongdoers: *first*, those who associate themselves to do the particular wrongful act, or from some prior association are as a group under some joint liability;[1] *second*, those who are by reason of some rule of remedial legal policy held jointly liable for the conduct of the actual wrongdoer, or the condition of the injurious thing;[2] *third*, those who are under successive duties in regard to the same dangerous condition;[3] or, *fourth*, where the plaintiff relying on the defendant's apparent right to deal with property so acts by his authority as to incur liability to the true owner.[4] It has never been applied to cases of concurrent but independent wrongs to the combined effect of which the harm is due and where the only point of contact is in the combination of their effect in bringing about the final catastrophe.[5]

Even in their application to these widely different fields the development of the two principles has been entirely separate; the limitations and exceptions to them not merely distinct and different, but often the very opposite to one another.

1. Contribution, though refused between persons actually themselves the wrongdoers, is allowed where they are not personally

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[1] Peck *v.* Ellis, 1 Johns. Ch. (N. Y.) 131; Nickerson *v.* Wheeler, 118 Mass. 295 (a failure to file certificate, a duty placed on directors as a group).

[2] Two partners owning a stagecoach — one was sued by a passenger injured by negligence of a driver — having paid judgment, he was held entitled to contribution from his partner. Worley *v.* Batte, 2 C. & P. 417; Horbach *v.* Elder, 18 Pa. St. 33; Bailey *v* Bussing, 28 Conn. 455; Clarion Co. *v.* Armstrong Co., 66 Pa. St. 218 (bridge reparable by two counties).

[3] See Washington Gas Light Co. *v.* Dist. of Columbia, 161 U. S. 316, and cases cited therein. The most usual case of this sort is where a city is forced to pay damages for injuries caused by a defect in the highway created by a lot-owner.

[4] See similar principle, Sheffield *v.* Barclay, [1905] A. C. 392.

[5] Save in the case of Nashua Iron Co. *v.* Worcester R. R., 62 N. H. 159, wherein the rule of last clear chance was applied to give indemnity against the last responsible actor in favor of the antecedent wrongdoer. While the case contains a very valuable discussion of the application of the rule of last clear chance, it would seem to be a sheer anomaly in regard to its ruling as to the right to indemnity. All the cases which it cites for the broad rule that indemnity is allowed save where the party seeking redress was a conscious wrongdoer, fall within far narrower exceptions to the rule denying indemnity between joint tortfeasors.

delinquent but are both liable for the acts of the actual wrongdoer by virtue of some relation in which they stand to him. Indemnity is given to the person morally innocent but legally liable, as against the actual wrongdoer whose misconduct has brought the liability upon him. On the other hand, a plaintiff is as much barred by his servant's negligence as his own, though the defendant is personally in fault. So, while the rules of contribution and indemnity regard as vital the difference between actual wrong and legal liability, contributory negligence regards them as immaterial.

2. In ascertaining the right to indemnity the law distinguishes between primary and secondary duties, between active misconduct and mere omission of duties of protection, between the creator of the dangerous condition, and him who should have protected the injured party from it. In contributory negligence the plaintiff is as completely barred from recovery where he has failed to take self-protective measures against a danger created by the defendant, as where he has himself created the danger and the defendant has failed to protect him therefrom. In fact, the last clear chance doctrine enforces the very opposite idea. It is the sequence in time of the successive negligences which is vital. He whose negligence is the final decisive cause of the harm must answer for it; while in regard to the right to indemnity, the actor, the creator, is liable over to him whose neglect of his positive duty is the final efficient cause, who had the last clear chance, if he had done what he was legally bound to do, to avert the harm.[1]

It seems equally undoubted that the defense of contributory negligence is not a mere variation nor an application to the specific facts of the rule that one who voluntarily encounters a known risk can blame no one but himself for the ensuing harm. In the earlier cases there was little, if any, attempt made to distinguish between voluntary assumption of risk and contributory negligence. Whether

[1] See Union Stock Yards Co. *v.* C., B. & A. R. R., 196 U. S. 217. The case of Nashua Iron Works *v.* R. R., 62 N. H. 159, must be regarded as anomalous. Even if the broad principle there laid down, that indemnity is to be allowed whenever the wrongs are not consciously or wilfully done, is admitted, this only marks the more strongly the essential dissimilarity to contributory negligence — when, of course, no such distinction is drawn — nor is any case cited to show that not merely contribution, but full indemnity is to be enforced, as between joint tortfeasors technically guilty though morally innocent, against the last responsible agent. In Palmer *v.* Wick, etc., S. S. Co., [1894] A. C. 318, there is an intimation that the Law Lords wished that the English law recognized, as the Scotch law does, a right to contribution for "*quasi delicts*," but even there the recovery was expressly based on the fact that the original judgment which plaintiff paid was a joint judgment against both him and the defendant.

the risk, though perceived, was voluntarily encountered, whether it was, though not seen, obvious if the plaintiff had used his senses, or capable of being discovered had he been properly on the alert, or whether he had, after knowledge of his danger, failed to exercise that care which even then would have sufficed to avert the harm, he was equally barred. It mattered little whether his conduct was regarded as an assumption of risk or as contributory negligence.[1] Nevertheless there arose from time to time cases where the two had to be distinguished, because, while contributory negligence was no bar, the voluntary assumption of a known risk did prevent recovery. Early cases are therefore not entirely wanting which recognize the inherent difference between the two.[2]

Of late years, however, there has come into existence a constantly increasing class of cases where, for various reasons, a risk perfectly recognized is held not to be assumed by one placing himself within reach of it, but where none the less he may be barred if he is guilty of contributory negligence.[3] The distinction between voluntary

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[1] This same confusion of thought still persists in many classes of cases. Many conscious intentional acts obviously exposing the actor to perfectly recognizable risks are still constantly spoken of as acts of contributory negligence. There is, however, a growing tendency to more accurate classification. See Burns *v.* R. R., 183 Mass. 96; McDonough *v.* R. R., 191 Mass. 509; Harding *v.* R. R., 217 Pa. St. 69, where the act of standing on the platform of a trolley car is treated as an exposure to a known danger incident to the position; the only open question being as to whether or not the exposure was voluntary and the injury the result of a risk which should have been recognized as inherent in the position assumed. See Smith, J., in Thane *v.* Traction Co., 8 Pa. Super. Ct. 451.

[2] See Lynch *v.* McNally, 73 N. Y. 349, and Mullen *v.* McKesson, 73 N. Y. 195, where it was held that while the defendant, who had kept on his premises animals known to be vicious, was not relieved of liability by contributory negligence of the victim in failing to take care to avoid such animals, he was relieved if the plaintiff with full knowledge of the dangerous nature of the animal deliberately put himself within reach of it. Compare the decision of Paulus, Sent. Rec. 1, 15, § 3, "*ei, qui irritatu suo feram bestiam vel quamcumque aliam quadrupedem in se proritaverit, eaque damnum dederit neque in ejus dominum neque in custodem, actio datur.*" In this respect the civil and common law seem to be at one.

[3] Of these by far the most important are those dealing with relations of employer and workman. Many statutes have been passed, and more will undoubtedly be enacted, requiring of the employer either care in the preparation of a safe plant in general, or some particular specific protective precaution. In some of these it is expressly provided that knowledge of the breach of such statutory requirements and a continuance in their employment thereafter shall not bar recovery. Schlemmer *v.* R. R., 205 U. S. 1; N. Y. Employers' Liability Act of 1902. In others the same result has been reached by judicial construction. Smith *v.* Baker, [1891] A. C. 321; Narramore *v.* R. R., 96 Fed. 298. There are also some cases where, while contributory negligence is no bar, voluntary assumption of risk defeats recovery. See Mullen *v.* McKesson, *supra*. It is by no means certain that this is not so of the Employers' Liability Act, applicable

assumption of risk and contributory negligence has thus become of immense practical importance, and it is essential to fix with precision the exact boundary between the closely adjacent fields which they occupy.

One suggested line of demarcation may be at once dismissed. The weight of reason and of authority is against the view that voluntary assumption of risk is confined to relations created by contract, and arises out of an implied term of the contract creating the relation.[1] It is, on the contrary, an incident inevitably attached by law to all relations and associations, contractual or otherwise, which are voluntary upon both sides. The plaintiff's actual consent to run the risk is immaterial; having no right save that derived from the defendant's consent to enter into relation or association with him or his property, he cannot complain because the defendant makes that association dangerous. He may either take it as he finds it or leave it, but if of his own free choice he chooses to enter into association with the defendant, he must *perforce* accept the risks obviously inherent therein, no matter how strongly he protests against them, or how emphatically he expresses his unwillingness to run them.

The differences between voluntary assumption of risk and contributory negligence are many and fundamental.

1. Voluntary assumption of risks negatives the idea of even *primâ facie* liability. If the plaintiff has no legal right to place himself in juxtaposition[2] with the defendant, his premises or business, if his association therewith is entirely dependent upon the latter's consent, the defendant owes him no duty in regard to the condition of his premises or plant or the system which he chooses to adopt in the conduct of his business, save that the actual shall conform to the apparent conditions. If the danger be apparent, there is no further duty; if it be not apparent, then notice of it must be given.

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to carriers engaged in interstate commerce, passed by Congress, June 11, 1906. See 20 HARV. L. REV. 94, n. 3. While this act has been recently declared unconstitutional, Howard *v.* Ill. Cent. R. R., and Brooks *v.* So. Pac. R. R., U. S. Sup. Ct., Jan. 6, 1908, there seems no doubt that some similar act will sooner or later be passed in a form designed to meet the objections of the court — in fact such a measure has already been introduced by Senator Knox.

[1] See Bowen, L. J., in Thomas *v.* Quartermaine, 18 Q. B. D. 685, 698, and Knowlton, J., in O'Maley *v.* South Boston, etc., Co., 158 Mass. 135, 136. See *contra*, St. Louis Cordage Co. *v.* Miller, 126 Fed. 495, and Stonington Co. *v.* Mann, 219 Ill. 242.

[2] Henn Collins, then M. R., in Burr *v.* Adelphi Theatre Co., [1907] 1 K. B. 544.

2. The plaintiff must voluntarily, consciously, and deliberately elect to encounter a known risk. No risk can be said to be assumed until the plaintiff has knowledge of the danger and elects to enter into the association subjecting him to it, or, having an opportunity to discontinue an association in which some new danger is discovered, chooses not to do so.[1]

3. The plaintiff's inability to recover where the danger being known is voluntarily encountered is not based upon any thought that in so doing he has acted improperly, or has fallen away from the normal standard of proper behavior. It is based on the idea that the plaintiff, being free to take or leave the association, has, with full knowledge of its danger, chosen to take it, and upon the idea that the defendant, being free to refuse to allow the plaintiff to come into juxtaposition with him at all, owes him no duty beyond that of full disclosure of the true conditions under which the relation is to be maintained. Therefore it does not matter whether, in view of the extent of the danger and of the advantages to be derived from encountering it, a reasonably prudent man would or would not have subjected himself to it. The risk may be of the slightest and most remote, the object to be attained by encountering it the very livelihood of the plaintiff; his act may therefore be prudent or even praiseworthy, but he is just as much barred from recovery, the defendant owes him no greater duty than if the risk was enormous and the advantage to be gained trivial and so his conduct both reckless and foolish.

1. Contributory negligence, upon the other hand, is an affirmative defense,[2] operating at a later stage of the proceedings to displace a liability *primâ facie* established. A finding by the jury that the plaintiff has not assumed the risk voluntarily does not negative the existence of contributory negligence on his part, nor prevent the defendant from setting it up as a defense.

2. Contributory negligence excludes the idea of deliberation. It involves rather an unintentional failure to measure up to the self-protective duty of a man situated in a civilization where dangers

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[1] So where an engineer discovers a defect in his engine during a run — since he cannot leave his post without imperilling the safety of all concerned in the operation of the road, he does not assume the risk by continuing to drive it. He is compelled to encounter it, he cannot be said to voluntarily assume it until he can without danger to himself or others abandon the position to which it is incident. Mason *v.* Yockey, 103 Fed. 265; Le Duc *v.* R. R., 92 Minn. 287. But see Williams *v.* R. R., 149 Fed. 104.

[2] Though this is not universal, it is the general rule. See Sherman and Redfield, Negligence, 4 ed., §§ 106–108.

are constantly occurring. If the danger is perceived and consciously encountered, the case is more properly one depending upon (*a*) whether the plaintiff in so doing acted voluntarily, uncoerced by any improper pressure, and having no legal right to do the act in the course of which he must subject himself to it, or (*b*) whether, though he has such legal right, the danger is so great that it is unreasonable in the face of it to insist upon its exercise.

3. The very essence of contributory negligence is that the plaintiff has misconducted himself, that he has done or omitted to do something which under the circumstances of the case a reasonably prudent man would not have done or omitted to do.

These three salient points of difference show sufficiently the essentially dissimilar character of the two defenses.

Save in one particular, that of providing safe conditions of association, one who allows another to enter into even a voluntary relation with him is bound thereby to take care that no act or omission on his part shall subject that other to risks not necessarily involved in the known conditions under which that relation is to be maintained. And the measure of this care is that which a reasonably prudent man would under the known circumstances realize to be necessary to the plaintiff's safety. While the defendant is not bound to make the conditions safe, he is not entitled to act as though they were safe; their dangerous character is one of the circumstances in the light of which the care that a reasonably prudent man would, and consequently which the defendant should exercise to secure the plaintiff's safety is to be ascertained. In a word, voluntary assumption of risk merely negatives the duty to take care to provide safe conditions for association, and so prevents the failure to do so from being actionable negligence when the plaintiff's harm results, so far as the defendant's conduct is concerned, from this alone; it does not affect the defendant's duty in other particulars or the plaintiff's right to recover where his harm is caused by the breach of any duty owing by the defendant to him, nor is it in such case a defense that the defective condition was a concurrent and necessary cause of his harm.[1] So too,

[1] It is not necessary to a valid right of action that the defendant's wrongful conduct shall be the sole cause of the plaintiff's harm; it is enough that it is an essential cause. So he is not relieved from liability, if his misconduct be an efficient cause, by the fact that there is another concurrent cause for which he is not legally responsible, without

where, for any reason, a risk, though knowingly encountered, is held not to be voluntarily assumed, while this throws upon the defendant the duty among other precautions for the plaintiff's safety to make the premises safe, and allows the plaintiff to recover where no other fault on the defendant's part aids in bringing on the harm, it does not insure him against every harm attributable to such conditions, nor relieve him from his duty to conduct himself as a reasonably prudent man would under the circumstances, again including the known dangerous condition.

Consequently, while the plaintiff may be entitled to find the premises or plant safe, and thus his mere act in bringing himself within reach of a known dangerous defect therein in order to assert his right, may not bar his recovery, the risk may be so imminent, the danger so great, so out of all proportion to the value of the object to be gained by encountering it, "that no sensible man would have encountered it"[1] to enjoy the exercise of the right. It may perhaps be doubted whether, in fact, this can be said to be in any true sense contributory negligence; contributory misconduct it certainly is.[2] Perhaps to distinguish it from contributory negligence in its primary sense of a mere unintentional omission of due caution, of failure to take self-protective care, it may well be termed a contributory default, in the nature of an unreasonable insistence upon the extreme exercise of legal right in the face of manifest and imminent danger.[3]

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which the harm would not have resulted; and it can make no difference whether he is not liable for this concurrent cause because the act was not his own, but that of another legally a stranger to him, or because the act, though his, is one which is not wrongful on his part, he owing to the plaintiff no duty in regard thereto.

[1] Patterson, J., in Clayards *v.* Dethick, 12 Q. B. 439, 445; R. R. *v.* Crotty, 141 Fed. 913.

[2] It partakes of the nature of contributory negligence in this, that there is a *primâ facie* liability on the defendant's part, a duty of care and a breach thereof, and improper conduct on the plaintiff's part set up as a defense thereto. It differs from the primary conception of negligence in this, that a known danger is deliberately encountered. In this it approaches more nearly to assumption of risk. There being, however, a right to enter the relation or do the act involving the risk, it lacks the element of free and unconstrained choice essential to the latter defense.

[3] The earliest case of contributory fault was of this character. Cruden *v.* Fentham, 2 Esp. 685 (1798). There the plaintiff ran into the defendant's gig, which was on the wrong side of the road. Lord Kenyon charged the jury that "the fact that the defendant was on the wrong side of the road did not justify the plaintiff in crossing out of his way in order to assert what he termed the right of the road. It was putting himself voluntarily in the way of danger, and the injury was of his own seeking. However, if the jury thought otherwise, they would find for the plaintiff." The jury having found for the

The difference between such contributory default and voluntary assumption of risk is merely one of degree rather than of kind.[1] But even though the risk be not so great as to make the mere encountering of it unreasonable and improper, the plaintiff is still bound to take such care as a reasonable man would deem necessary, in view of the known defective condition of the premises or plant, so that no act or omission of his while upon them or using them shall unduly increase the dangers necessarily inherent in such defective conditions. The difference between assumption of risk, or such contributing default, and true contributory negligence in its primary and proper meaning of mere unintentional conduct falling below the standard of proper social behavior, is not one " of degree of proximity "[2] alone, but of kind. Voluntary assumption of risk is the mere passive subjection by the plaintiff of himself to the risk of injury inherent in known defective conditions. Contributory negligence is an act or omission on the plaintiff's part tending to a reasonable probability to add new dangers to his situation, not necessarily incident to the known defective conditions, and bringing upon himself a harm not caused solely by them, but created in part at least by his own misconduct.

However, in determining the care which the defendant must use towards the plaintiff in view of the known dangerous condition of the premises or plant in cases where the plaintiff has voluntarily assumed the known risk, and of the care which the plaintiff must take to protect himself where the danger though known is held to be voluntarily assumed, it is essential that the care required be such as can reasonably be required, not merely in view of the dangers known to exist, but also of the proper operation of the defendant's business or the efficient performance of the work on which the plaintiff is engaged. The standard of care must not be unreasonably high. It is not to be forgotten that it is quite possible to nullify either the common law exemption from liability attendant

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plaintiff, a new trial was refused, Lord Kenyon saying that "as it was a question of public convenience the verdict had better rest as it was." This case shows the view prevalent among Englishmen of that period as to the extent to which an individual might go to assert and maintain his strict legal rights.

[1] Depending on the extent and imminence of the danger and the value of the right asserted.

[2] See Holmes, J., in Schlemmer *v.* R. R., 205 U. S. 1, 13. True it is that contributory negligence generally operates at a later stage of the transaction, and is usually the last of the two concurring causes of the harm sustained, but this is only an accidental incident, and not an essential attribute.

upon voluntary assumption of risk, or a statutory protection placed around those whose necessities force them to encounter, *nolens volens*, well-recognized dangers, by requiring that while, on the one hand, the defendant is relieved of the duty to remove the danger, he must bear the burden of preventing it from ripening into injury by taking precautions which, though theoretically possible, would in practice be incompatible with the use of his premises or plant; or, on the other hand, by requiring that while the plaintiff does not assume the risk, he must bear a similar burden of precaution, impossible if his duties are to be promptly and efficiently discharged. It is practically impossible to conceive of a danger not so imminently dangerous "that no sensible man would encounter it," which cannot be avoided by the exercise of some conceivable precaution on the part of the plaintiff, a workman who in the course of his duty is called upon to deal with the defective tool or appliance, or to come to the place where the dangerous condition exists. Where the legislature has intended to protect such workmen from their own inability to resist the pressure of their economic necessity by providing that certain precautions shall be taken for their safety, which through their inferiority they are unable to insist upon for themselves, to hold, that unless they take such impossible precautions as this, they are to be regarded as guilty of contributory negligence and so barred from recovery, would destroy the protection in that most usual and important class of cases where the workman is injured while himself using the defective tool or appliance, or by coming to the place where the defective condition exists. The protection of such statutes would extend no further than to that small class of cases where the plaintiff's association with the defective conditions is remote; where he is not called on to use the instrument himself, and where the only danger that threatens him is that he may be injured by some fellow servant's use of it. Recovery would only be possible when the injury was received by the use or merely negligent misuse of a known defective tool, not by himself, but by some one with whom he was associated. Where statutes passed by a legislative body whose enactments are to be supreme, are to be construed and applied in jurisdictions where the prevalent economic attitude may be radically opposed to that which prompted the passing of the act, as in the case of federal statutes which are to be enforced and applied by the courts of the various states, it is essential, in order that the statutes may not be judicially nullified, that the courts of the su-

preme jurisdiction shall freely and fearlessly exercise their appellate powers.[1]

Even in the absence of that line of decision which has distinguished between contributory negligence and assumption of risk, the points of difference between the two are so many and obvious that the distinctive character of each is plainly apparent. Yet it by no means follows that because the one is not a mere variation or product of the other, they are not both based upon the same fundamental conception of the proper function of private remedial law.

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[1] In Schlemmer *v.* R. R., 207 Pa. St. 198, the Supreme Court of Pennsylvania had decided that when a brakeman was injured in coupling a car unprovided with automatic couplers as required by act of Congress (27 Stat. at L. 537, § 2), though the act expressly provided that knowledge of its violation should not entail assumption of the risk of injury therefrom, his act in lifting his head some few inches too high when making the coupling was contributory negligence *per se*. On appeal to the Supreme Court of the United States this was reversed (205 U. S. 1), and though the decision was by a bare majority of five to four, it is submitted that it is correct and necessary. While the question of negligence is one of mixed fact and law, the function of the court in relation thereto is purely judicial. In all issues of fact the court has and must have the power to keep the jury within a proper exercise of their function of drawing inferences of fact. So, of course, when reasonable men can arrive at only one conclusion upon the undisputed facts, the court may well remove the case from them, a contrary finding being possible only as a result of prejudice or error. Even here their exercise of this power is a matter of judicial discretion, a plain abuse of which is ground for reversal. There is, however, a tendency very marked in some jurisdictions to so exercise this power as to substitute as the standard of proper social conduct, especially on the part of a plaintiff, the opinion of the court as to what the person should do in the best interests of the common weal, for that of the jury as to what the average man would regard as prudent. This tendency is particularly marked in Pennsylvania, a state wherein the doctrine of a protective tariff is regarded as sacred even from criticism, and where the economic attitude is, therefore, naturally toward the encouragement of business even at the expense of the individual. The working out of such a policy which, while popular enough in the abstract on election day, can hardly be expected, in its logical consequence of throwing on the individual the primary duty of protecting himself, if it be in any way possible, from the misconduct of business, to appeal to a jury confronted with a specific instance of its working. The benefit to the community, no matter how strongly emphasized by the court in its charge, is almost sure to be lost sight of in the sympathy for the injured plaintiff, who after all has done about what the jury are accustomed to do habitually and to consider perfectly proper. It is manifest that this conception must be enforced, if at all, by the court itself. To insist on care which the average prudent man would never imagine to be necessary, *i. e.*, to set up a new standard of proper social conduct, creates a new rule of law and is an act purely judicial — in no true sense is it a finding of fact at all — and it is essential that such rulings be carefully scrutinized by the Supreme Court of the United States, lest the public policy of the supreme jurisdiction which has led to the passage of the act be nullified by antagonistic economic conceptions of the inferior jurisdiction in which it must procedurally be enforced.

Consent also differs from voluntary assumption of risk. It is manifestly improper and inaccurate to speak of assumption of risk as an implied consent to receive the harm sustained. One can be properly said to consent to a harm only when he knows that the harm will ensue and intends to suffer it. One voluntarily assuming a risk in practically every case hopes and expects to escape injury. If the maxim *volenti non fit injuria* is to express with any approach to accuracy the principle of voluntary assumption of risk, *volens* must be taken to mean willing to run the risk, not to endure the harm.[1]

Yet undoubtedly both of these principles had their root in the same legal conception, the same individualistic view as to the proper province of private law. Where no public interest is at stake, no public harm done or threatened, each individual was and is left free to do what he pleases with his own. The state has no interest in his getting the utmost benefit from his merely private rights. It protects him in his right to do what he pleases with them — so it prohibits their invasion without his consent — it does not attempt to protect him from his own folly in dealing with them. It does not prohibit him from dissipating his resources in any way he pleases, from throwing them away, from destroying them himself, or from consenting to their destruction or impairment by others. Such is the underlying basis of consent.

The same conception logically leads to the somewhat different but cognate principle that as he may give away his private rights, as he may consent to their destruction, so, while risks may not be forced upon him against his will, he may place them in what peril he please, subject them to what risk he chooses, and he who gives him the opportunity to do so is no more guilty of a wrong toward him than he who, with the consent of the owner, takes his property.[2]

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[1] In fact it would seem that the maxim properly understood applies only to consent, for unless the plaintiff wills to receive the particular *damnum*, he can hardly be said to be in any true sense *volens* thereto.

[2] So far the civil law and common law are at one. At both consent or voluntary assumption of a known risk negatives even *primâ facie* liability, but here or hereabouts the civil law appears to have stopped. It is often said by writers on the civil law that it recognized the defense of contributory negligence. Hunter, Roman Law, 2 ed., 246–247; Howe, Studies on the Civil Law, 206 *et seq.*; Wharton, Negligence, 2 ed., § 130. On examination it will be found, however, that the examples on which they base their conclusions are all cases where the injured party voluntarily and without legal right encountered an existing and known, or obvious danger, — as where

This, however, does not account for the defense of contributory negligence. So far there has been a conscious, freely willed destruction or imperilment of a right with which the owner is free to do what he pleases. Contributory negligence goes much further. It throws on the individual the primary burden of protecting his own interest. The courts are the last resort of him who not merely does not, but cannot, protect himself. This conception is part of the very atmosphere of English legal thought, — it is not peculiar in the law of torts to negligence alone, nor is it even confined to the law of torts. The peculiarly common law rule of *caveat emptor* is based upon it. The first distinct statement that "when common prudence and caution of man are sufficient to guard him the law will not protect him in his negligence," is by Lord Kenyon in Pasley *v.* Freeman,[1] an action of deceit. Nor is this to be wondered at. The civil law conception that an individual may do what he pleases with his own is tinged by the peculiarly English characteristics of independence and self-reliance, and so becomes supplemented in the common law by the more intensely individualistic conception that he is also his own first bulwark against outside interference, and that the function of remedial law takes on where the power of self-protection ceases. The civil law appears to go no further than to recognize that the plaintiff is barred from recovery, when at common law he would be held to have assumed the risk,[2] all beyond this appears to be a peculiarly common law growth.

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a slave walking across the Campus Martius was struck by a javelin thrown by a soldier at exercise (D. 9-9-4); where a customer who patronizes a barber having his chair in the market place where people are accustomed to play ball, has his throat cut by reason of a ball striking the barber's arm (D. 9-2-31); and where a man by teasing wild animals causes them to harm him (Sent. Rec. 1-15, § 3).

[1] 3 T. R. 51. See also the very instructive case of Bailey *v.* Merrill, 3 Bulstr. 95 (1659), where a carrier sued in deceit a shipper who had understated the weight of the goods, but, by Dodderidge, J., "Here is plain default in the carrier, he at his peril ought to have looked to this before."

[2] It is at the point where voluntary assumption of risks shades most nearly into contributory negligence that the civil law most closely approaches this conception. The nearest approach to a recognition by the civil law of contributory negligence in the examples cited by text-writers is the case of a man injured by falling into a trap set for bears or deer, either on a highway or upon a customary path (D. 9-2-28); here it is said that there are many cases found in which the plaintiff was barred if he was able to avoid the peril. This of itself is appropriate either to voluntary risk or to contributory negligence. In the previous sentence it is said, however, that a cause of action arises where there is no notice given and the danger is not known or obvious. "*Si neque denuntiatum est neque scierit aut providere potuerit.*" If *providere* means more than to observe the obvious, this case comes close to a recognition of a

The development in the law of negligence of this idea was necessitated by the enormous growth of protective duties incident upon the extraordinary economic and mechanical changes taking place during the early part of the nineteenth century. A civilization in which the relations between individuals were few and simple, in the course of a few years, was turned into one in which individuals were thrown into a multitude of complex and novel associations. The extent of the social duties of one citizen to another became enormously enlarged. Unless each man was to be regarded as his brother's keeper, unless he was to be unduly burdened with the duty of practically insuring the world against the results of his conduct, it was necessary that the correlative duty of self-protection should be extended as a counterpoise and corrective.[1] It was manifestly unfair that the whole burden of protective caution should be thrown on one of the two parties, or that any man should be required to take better care for others than such persons are bound to take of themselves. The duty of care for others manifestly should be no higher than the duty of self-protection. To hold otherwise would be to unduly burden business and enterprise, to make of those engaged therein the guardians of those apt to be affected by their operation, and at the same time to rob of

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duty of precaution. It is indeed difficult to say to which of these two exhibitions of the individualism of remedial law belongs the rule that a man accepts risks not actually known to him, but which are obvious to one using his senses. It is enough to say that in such case the tendency of later common law decisions is to hold that the risk is assumed, not that the plaintiff is barred by his negligence in not discovering the danger (see Day, J., in McDade *v.* R. R., 191 U. S. 64, 68).

[1] So, while in other fields the extreme individualism of the common law is rapidly giving way, it still persists unimpaired in the law of negligence. In deceit the plaintiff need no longer investigate at his peril the truth of statements made to him. See Mitchell, J., in Ingalls *v.* Miller, 121 Ind. 191; Cotrill *v.* Krum, 100 Mo. 397. See the very late case of Pearson *v.* Dublin, [1907] A. C. 351, where Lord Atkinson intimates (p. 365) that even an express agreement not to rely on the defendant's statements might be void. So also the right of recovery of money paid intentionally, but under some mistake or improper pressure, has been greatly extended. So too the interest of the public, the Commonwealth, in the proper use of natural resources, has led in many instances to an abridgment of a property owner's privilege of doing what he pleases with what he finds therein. Compare Gagnon *v.* French Lick Springs, 163 Ind. 687, and Forbell *v.* N. Y., 164 N. Y. 522, with Pickle *v.* Bradford, [1895] A. C. 687, and Chasemore *v.* Richards, 7 H. L. Cas. 349. The tendency today is rather toward collectivism — a fuller and fuller recognition of the state as a party having an interest in what until recently were regarded as purely private controversies. But the state's principal interest in enforcing social good conduct is to prevent accidents, the adjusting of the loss therefrom being as yet regarded as primarily a matter of private concern, and this object can best be served by demanding due care from both parties concerned.

self-reliance, and so enervate and emasculate and in effect pauperize the latter by accustoming them to look to others for protection and by removing from them all responsibility for their own safety. To hold that, where the only wrong alleged is the defendant's failure to take care for the plaintiff's safety, the plaintiff's own failure to protect himself debars him from recovery, is but a logical and legitimate extension of the conception underlying consent and voluntary assumption of risk — that the plaintiff can ask from others no higher respect for his rights than he himself pays to them.

If the defendant's wrong be intentional, only consent, express or necessarily implied from the circumstances, will bar recovery. The defendant's intent to cause the harm must be met by the plaintiff's intent to suffer it. If it be an act deliberately done tending to the plaintiff's manifest injury, he must as deliberately subject himself to it. If it be a mere inadvertence, a similar inadvertence will bar his recovery. Logically, therefore, the defense of contributory negligence should apply only when the gist of the alleged wrong is the defendant's failure to take care for the plaintiff's safety. So the unanimous current of decision is that when the defendant's wrong is something more than mere negligence — when it involves an intent to cause harm — contributory negligence is no defense.[1]

When all is said, it may well be that in such case the defendant, in the language of the Year Books, "is to be punished for his wrong," — a wrong, in fact, quasi-criminal, not a mere breach of social duty.[2] While the compensatory feature of the law of tort is that most prominent in modern cases, while it is often asserted that the early punitive aspect has entirely disappeared, there is much that can only be explained by a survival of the earlier conception that private compensation was given as an incident to, or a means

[1] This is not dependent on the form of the action, whether trespass *vi et armis* or case, or whether the injury is direct or indirect, or upon the fact that the defendant's act was conscious and intended; the defendant must not merely intend to act, — his act must be intentionally hostile to the plaintiff, intended to injure him, or at least one done with conscious and reckless indifference to the plaintiff's safety; the act must not be wrongful only in that it was a breach of the defendant's social duty to take care not to expose the plaintiff to unnecessary danger. Compare the difference between conscious ignorance and careless belief in deceit. Peek *v.* Derry, 14 App. Cas. 337.

[2] See the language of Knowlton, C. J., in Banks *v.* Braman, 188 Mass. 367, where he emphasizes the fact that reckless driving is a criminal offense as well as social misconduct toward those using the highway, and Sultzberger, J., in Weir *v.* Haverford Electric Co., 64 Leg. Int. (Phila. C. P. No. 2) 4.

for, the punishment of the public wrong.[1] This conception, while it has perhaps survived where it first existed, has rarely been extended. The modern tort recognizing and enforcing social duties is in all its features purely compensatory. The question is not merely whether the defendant ought to pay, but whether the plaintiff ought to receive damages. While the intentional wrongdoer may well be punishable, even though his victim has by his own inadvertence rendered his harm possible or even probable, where the right to recover is based on the idea that one should make good the harm caused by his social delinquencies, and where, as in all cases of contributory negligence, the defendant's delinquency would have caused no harm to the plaintiff save for his own misconduct in not caring for himself, there is no reason that the law should regard one as the delinquent rather than the other. There is no reason to throw upon the one rather than the other the burden of preventing an accident actually preventable by proper care on the part of either, or of answering for the ensuing harm. It is for this reason, and because the law will not aid a plaintiff who having the power and consequent duty to protect himself has failed to do so, and not, as has been seen,[2] because the defendant's act has by reason of the plaintiff's contributing fault ceased to be a legally proximate cause of the harm suffered, that the defendant is relieved from liability by the plaintiff's contributory negligence.

But it is only where there is equal ability, equal opportunity to avert the harm, that this applies. The law requires impossibilities of no man. When the plaintiff is for any reason impotent to protect himself, the defendant is bound, if he himself be able by care to avoid harming him, to do so; and since the defense of contributory negligence is not punitive in its origin, since the plaintiff is not to be punished for his misconduct by being put outside the protection of the law and made a species of outlaw, a *caput lupis*, it cannot matter that this impotence is due to his own antecedent misconduct.[3]

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[1] See, for a modern tort action almost purely punitive, Laird *v.* R. R., 166 Pa. St. 4, and see Holt, C. J., in Ashby *v.* White, 2 Ld. Raym. 938, 958. "If such an action (for denying a rightful vote) comes to be tried before me, I will direct the jury *to make him pay well for it*, it is denying him his English right."

[2] *Ante*, p. 241.

[3] So, when the plaintiff by his voluntary intoxication renders himself helpless, it is generally held that the defendant, if he knows the fact, is liable for a subsequent lack of care toward him. Wheeler *v.* R. R., 70 N. H. 607; R. R. *v.* Kreinzer, 157 Ind. 587; R. R. *v.* Townsend, 69 Ark. 380. At least not by any act to increase his peril. Black *v.*

The decided cases recognize, though they do not expressly formulate, a difference between pre-caution and caution, — taking care in advance to provide against merely probable dangers, and careful action in the face of known peril to oneself or others.[1]

If the defendant's only fault is an absence of pre-caution, a like default on the plaintiff's part will debar the latter. If the injury results from a lack of care on both sides, both knowing of the danger and either being able to avert it if he act properly, the plaintiff is equally barred, but a mere failure of antecedent precaution to avoid the danger does not offset a lack of caution when the danger is known. Many of the decisions unnecessarily confuse the subject by treating such lack of care in the face of manifest peril as wanton misconduct equivalent to that intentional wrongdoing to which, as has been seen, contributory negligence is no defense. Wantonness, however, involves a *mens rea*, a conscious mental attitude of complete indifference to the safety of others,[2] differing ethically but little from a deliberate intent to injure, but entirely distinct from mere carelessness or incompetence, no matter how great. The knowledge of the peril may emphasize the necessity for careful or skilful action, but it cannot of itself make its omission wanton.[3]

But while the term wanton negligence, equivalent to intentional wrong, is frequently used,[4] it will be found that in few if any of

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R. R., 193 Mass. 448; Bagead *v.* R. R., 64 N. J. L. 316 (*semble*). *Contra*, Smith *v.* R. R., 114 N. C. 728; Woods *v.* Tipton Co., 128 Ind. 289.

[1] This is not a mere difference in degree of proximity, the one being regarded as a mere antecedent condition, the other as the true cause of the harm; for where there is a similar lack of precaution on the defendant's part, and a similar lack of caution on the part of any one other than the plaintiff, the defendant's lack of precaution is regarded as a sufficiently proximate cause of the plaintiff's resulting harm. The difference is one of kind — a difference in the nature of the duty.

[2] This, of course, can in general be inferred only from the actor's conduct; like all other mental conditions, it must be ascertained by its external manifestations.

[3] It is entirely anomalous in the modern tort that the mental attitude of the actor, the *mens rea*, can affect the legal consequence of his act. But such a conception is fundamental in the criminal law. Such decisions as Banks *v.* Braman, 188 Mass. 367, and Weir *v.* Electric Co., 64. Leg. Int. 4, must be ascribed to a persistence of the early quasi-criminal and punitive aspect of trespass *vi et armis*. In fact, throughout both cases much emphasis was laid upon the fact that the defendant's conduct amounted to criminal negligence. While the distinction is drawn in actions of deceit between reckless assertions made in conscious ignorance of their truth or falsity and statements made in honest though careless belief in their truth, the analogy, though apparently close, is not perfect, for in deceit it is not the intent to defraud which is in question, but the existence of an honest belief.

[4] See Alger Smith & Co. *v.* Duluth Traction Co., 93 Minn. 314, and cases cited in Beach, Contributory Negligence, § 64, n. 14, and 2 Cooley, Torts, 3 ed., 1444, n. 57.

these cases is there any element of conscious recklessness or indifference to the safety of others. The plaintiff's alleged contributory negligence will be found to consist of some antecedent lack of precaution whereby he is exposed to a peril which he is himself powerless to avert. And the defendant's so-called wanton negligence will be found to be a failure in caution for the plaintiff's safety, his peril being perceived.[1] It is only where the defendant's act was antecedent to his discovery of the plaintiff's danger that actual wantonness, conscious indifference to the safety of others, has been insisted upon as an element necessary to the recovery by a plaintiff himself negligent at a latter stage in the transaction, whether his negligence has been a lack of precaution[2] or caution.[3]

To sum up, it would appear that the defense of contributory negligence is not a mere application to the particular facts upon which it arises of the rules governing proximity of causation, or of the right of indemnity or contribution between wrongdoers, or the voluntary assumption of a known risk, but is itself a distinct and separate exhibition of the individualism of the common law, which exhibits itself in other fields in the doctrines of consent and voluntary assumption of risk. It debars from recovery, even from an admittedly negligent defendant, one whose own social misconduct has been a concurring proximate cause of his harm. In many jurisdictions there has persisted, in this one particular connection, that conception of legal as distinguished from actual cause which prevailed when the earliest cases on contributory negligence were

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[1] Wells, J., in Murphy *v.* Deane, 101 Mass. 455. "In such case [where defendant knows of plaintiff's peril] what would otherwise have been mere negligence may become wanton or wilful wrong." So Judge Cooley says (Torts, 3 ed., 1443, § 811). "If, therefore, the defendant discovered the negligence of the plaintiff in time, by the use of ordinary care, to prevent the injury and did not make use of *such care* for the purpose, he is justly chargeable with reckless injury, and cannot rely on the negligence of the plaintiff as a protection" (see cases cited note 57, p. 1444). Where the plaintiff is a trespasser, some jurisdictions hold that the owner is only bound to refrain from affirmative acts which, while not specifically intended to injure him, contemplate his presence and are consciously directed toward him. Palmer *v.* Gordon, 173 Mass. 46; Griswold *v.* R. R., 183 Mass. 434; Magar *v.* Hammond, 183 N. Y. 387. But it is to be remembered that the privilege of an owner to conduct himself in his business on his own premises as he pleases without regard to those who without his consent intrude thereon, is of the highest. Mr. Justice Holmes, 7 HARV. L. REV. 4. But in general it may be said that if both the trespasser's peril and helplessness be known the owner is bound to take care that no act of his injures him. Tanner *v.* R. R., 60 Ala. 621; Spearen *v.* R. R., 47 Pa. St. 300.

[2] As in Banks *v.* Braman, 188 Mass. 367.

[3] As in Weir *v.* Electric Co., 64 Leg. Int. 4.

decided, and which has become obsolete in other fields, which regarded the last actor, him whose conduct supplied the final impulse, as the sole responsible cause, and this whether the plaintiff's peril was actually known to the defendant or could have been discovered had he exercised normal care.[1] Nor is it strange that in this one particular class of case this archaic idea continues. The very tendency toward a fuller and more complete measure of responsibility on the part of those guilty of social misconduct which led to the repudiation of the rule in Vicars *v.* Wilcocks where it restricted liability, naturally tended to retain it where its abandonment would have restricted rather than enlarged the liability of a negligent defendant. Then, too, it was difficult in practice to distinguish between the failure to take care where the plaintiff's danger and his inability to help himself was known to the defendant, and the case where the defendant, had he been on the alert, as he should have been, could have discovered it.[2] Since, admittedly, the defendant was liable in the one case, it was hard to deny the plaintiff relief in the other. And it is submitted that the doctrine of last clear chance goes no further than this. Where the defendant, had he discovered the plaintiff's peril, would be powerless to avert it, even

[1] This the so-called last clear chance doctrine prevails in the following jurisdictions: Radley *v.* R. R., 1 App. Cas. 754; Carron *v.* Cayon, 9 App. Cas. 873; Tolson *v.* R. R. Co., 139 U. S. 551; Ives *v.* R. R., 144 U. S. 408; R. R. *v.* Anderom, 85 Fed. 552; Frazer *v.* R. R., 81 Ala. 185; R. R. *v.* Finley, 37 Ark. 369; Meekes *v.* R. R., 56 Cal. 513; Di Prisco *v.* R. R., 4 Pen. (Del.) 527; R. R. *v.* O'Donnell, 207 Ill. 478; Traction Co. *v.* Kidd, 79 N. E. 347 (Ind.); Wooster *v.* R. R., 74 Ia. 593; R. R. *v.* Hudgins, 98 S. W. 275 (Ky.); R. R. *v.* Armstrong, 92 Md. 554; Rapp *v.* R. R., 190 Mo. 144; Nashua Iron Co. *v.* R. R., 62 N. H. 159; Nasbert *v.* R. R., 59 S. E. 644 (S. C.); R. R. *v.* Few, 94 Va. 82; Redford *v.* R. R., 15 Wash. 419. The doctrine is approved in Austin *v.* R. R., 43 N. Y. 75; Costello *v.* R. R., 161 N. Y. 317; but in the later cases there is a tendency to apply it only where there are distinct stages in the transaction, and where the defendant's negligence occurs after the second situation has been created by plaintiff's default. Rider *v.* R. R., 171 N. Y. 146; McDonald *v.* R. R., 87 N. Y. Supp. 699; Bortz *v.* R. R., 79 N. Y. Supp. 1046; Wertzman *v.* R. R., 53 N. Y. Supp. 906.

[2] See Batteshill *v.* Humphries, 64 Mich. 514, 581, a failure to observe plaintiff's obvious danger is treated as wanton misconduct. See also R. R. *v.* O'Donnell, 207 Ill. 478. But see Warner *v.* R. R., 141 Pa. St. 615. In Pennsylvania the plaintiff is barred if his misconduct, and the utmost care is required on his part, is in *any way* a cause of his harm. Such qualifying words as "materially," or "directly," used in a charge to the jury have been held to be reversible error. Monongahela *v.* Fisher, 111 Pa. St. 9. It would seem that the plaintiff is barred if his misconduct is a *causa sine qua non* of his injury. Thane *v.* Traction Co., 191 Pa. St. 249. It is, to say the least, doubtful whether a plaintiff who by his negligence is placed, helpless, in a position of peril can recover against a defendant who perceives both his peril and his helplessness, in the absence of some actually wanton misconduct directed toward him. See, however, Wynn *v.* Allard, 5 Watts & S. (Pa.) 524.

though his inability to save the plaintiff is due to some prior misconduct whereby he has put it out of his power to do so, he is generally held not to be liable for the ensuing harm, nor will it matter which of the two antecedent misconducts, the plaintiff's or the defendant's, was the last in point of time if neither, after the danger is or should be discovered, is capable of averting it.[1]

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[1] See McDuffy *v.* R. R., 79 Fed. 941; Csatlos *v.* R. R., 75 N. Y. Supp. 583. See also the excellent opinion of Carpenter, J., in Nashua Iron Co. *v.* R. R., 62 N. H. 159.